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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DORIS HELLER,

Petitioner,

v.

NORCAL MUTUAL INSURANCE COMPANY ET AL.,

Respondent.

Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner's right to privacy afforded to her by the United States Constitution was violated by Respondents' attainment and disclosure of information during a physician-patient relationship and the California Supreme Court's subsequent holding that Petitioner's complaint did not sufficiently allege a privacy violation.

2. Where an international treaty guarantees the right of privacy to individuals, can a state statute or state constitutional provision permit an insurer and a patient's treating physician to obtain and divulge nonrelevant, confidential information about that patient.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Doris Heller, who was the plaintiff, appellant, and petitioner and the Respondents, Norcal Mutual Insurance Company and Dr. Kent Yamaguchi which were the defendants, appellees and respondents.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Doris Heller, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Supreme Court entered in the above proceedings on July 25, 1994.

OPINIONS BELOW

The opinion of the California Supreme Court is reprinted in the appendix hereto, p. 1a., *infra*.

The opinion of the Court of Appeal of the State of California Fifth Appellate District is reprinted in Appendix hereto, p. 45a, *infra*.

JURISDICTION

Petitioner filed an action against the Respondents herein, and other parties who have since been dismissed, invoking her right to privacy under the California Constitution, Article I, Section 1, and the United Stated Constitution through the Fourteenth Amendment. The Fresno County Superior Court sustained Respondents' demurrer without leave to amend. On appeal to the Fifth District, the appellate court reversed the trial court's holding (see Appendix - California Court of Appeals Fifth District Opinion, p. 45a) as to Petitioner's seventh, eighth, ninth and twelfth causes of action of the Fourth Amended Complaint and ordered a writ of mandate be issued directing the trial court to vacate its January 31, 1991 order.

Respondents then filed an appeal to the California Supreme Court. Between the time the California Fifth Appellate District ruled on the Petitioner's appeal and the filing of the Respondent's appeal to the California Supreme Court, this Court decided *Hill v. NCAA* 7 Cal.4th 1 (1994), which was a case of first impression for the California Supreme Court in interpreting the California Constitution, Article I, Section 1, as applied to the Federal Constitutional right to privacy. The California Supreme Court applied this holding to Petitioner's case and reversed the Appellate Court's decision.

The jurisdiction of this Court to review the judgment of the California Supreme Court is invoked under 28 U.S.C. Section 1257(a).

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

Article 3, Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;. . .

Article 6, Section 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fourteenth Amendment

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA STATE CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 1

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, and acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

STATEMENT OF THE CASE

Petitioner Doris Heller was a patient of John Geis, M.D., a plastic surgeon, who committed medical malpractice when he improperly treated a staphylococcal infection which developed in her left hand after surgery for a bone spur. As a result of Dr. Geis' negligence, Petitioner developed the painful and debilitating affliction of reflex sympathetic dystrophy. Once his negligence was complete and the damage done, Dr. Geis called in Respondent Kent Yamaguchi, M.D., to assist in two amputations of Petitioner's fingers. On or about September 21, 1987, Dr. Yamaguchi became Petitioner's treating physician for her dystrophy. (Appendix - California Court of Appeals Fifth District Opinion, p. 48a.)

Petitioner filed a lawsuit against Dr. Geis on June 9, 1988, for professional negligence, against which he was defended by his medical malpractice carrier, Respondent Norcal. During the course of the Geis litigation and while Petitioner was being treated by Dr. Yamaguchi, representatives of Norcal - which also insured Yamaguchi - secretly met with Yamaguchi regarding Petitioner's case on several occasions. (Appendix - California Court of Appeals Fifth District Opinion, p. 48a.) These meetings took place outside formal discovery and on an ex parte basis. During those meetings, Dr. Yamaguchi and Norcal agreed that the former would obtain from Petitioner and release to Norcal his patient's "private intimate, personal, financial, and confidential medical information...in order to obtain an economic advantage" in the lawsuit against Petitioner. (Appendix - California Court of Appeals Fifth District Opinion, p. 49a.)

Additionally, as Petitioner alleged, Respondents conspired to modify Petitioner's medical care and treatment and tailor her medical records to minimize any appearance of negligence on Dr. Geis' part. Between June 15, 1988 and January 12, 1989, Dr. Yamaguchi also agreed - again ex parte - to act as Norcal's expert witness in the Geis litigation. (Appendix - California Court of Appeals Fifth District Opinion, p. 49a.) As part of the conspiracy between Respondents, Dr. Yamaguchi attempted to coerce Petitioner into settlement of her

case against Dr. Geis. He also met with Norcal representatives to formulate a "treatment plan and a psychological program to effectuate a settlement" of Petitioner's malpractice claim. (Appendix - California Court of Appeals Fifth District Opinion, pp. 49a-50a.) Eventually, Petitioner settled her lawsuit against Dr. Geis for $400,000.00. (Appendix - California Supreme Court Opinion, p. 4a.)

On August 22, 1989, Petitioner Doris Heller filed her initial complaint in this case against Respondents Dr. Kent Yamaguchi, Norcal Mutual Insurance Company, and Central California Faculty Medical Group, Inc., as well as against other defendants who have since been dismissed. After a series of demurrers and motions, Petitioner filed a Fourth Amended Complaint on November 21, 1990, which added Valley Plastic Surgeons Medical Groups, Inc. (Appendix - Appellant's Answer Brief on the Merits, p. 67a.) That complaint alleged, among twelve causes of action, that "Yamaguchi violated plaintiff's constitutional right to privacy by secretly disclosing confidential and private information to Norcal and its agents and employees." (Appendix - California Court of Appeals Fifth District Opinion, p. 53a.) Petitioner also claimed that Yamaguchi violated Civil Code sections 56.10, 56.20, and 56.26, subdivision (a). (Appendix - California Court of Appeals Fifth District Opinion, pp. 51a-52a.)

The Fourth Amended Complaint contained a First Cause of Action for post-conspiracy medical malpractice by Dr. Yamaguchi. (Appendix - Appellant's Answer Brief on the Merits, p. 70a.) That cause of action was not based on Dr. Yamaguchi's treatment of the injury which Dr. Geis had treated; but rather the modification of treatment which was part of the conspiracy between Respondents. This distinction - that Dr. Yamaguchi was never the target of Petitioner's lawsuit against Dr. Geis - was supported by the cause of action's express omission of paragraphs 8 through 14 of the general allegations which described Dr. Yamaguchi's co-treatment of Petitioner with Dr. Geis. Alternatively, the general allegation paragraphs 15 through 23 which were incorporated into the First Cause of Action limited this

cause of action to malpractice which occurred after Dr. Geis' malpractice was already complete. (Appendix - Appellant's Answer Brief on the Merits, p. 76a.)

Pleading that their actions were immune under California Civil Code section 47(b) - the so-called "litigation privilege" - Respondents demurred to all twelve causes of action. On January 31, 1991, the Fresno Superior Court granted most of Respondents' demurrers without leave to amend to all but the First Cause of Action for medical malpractice. In her response to Respondents' motion for reconsideration, which sought to eliminate all liability except the medical malpractice cause of action, Petitioner proposed a Fifth Amended Complaint and requested that she be allowed to amend. On April 8, 1991, the trial court granted all the relief requested by Respondents and sustained their demurrer without leave to amend. (Appendix - Appellant's Answer Brief on the Merits, p. 68a.)

The Petitioner appealed to the California Court of Appeals Fifth District on June 10, 1991, and additionally sought a writ of mandate compelling the trial court to set aside its orders sustaining the demurrers. The Fifth Appellate District consolidated the appeal with the mandamus action and on July 13, 1993 issued an Opinion which overturned the trial court's orders as to the violations of Civil Code section 56.10 et seq. and the Petitioner's right to privacy. (Appendix - California Supreme Court Opinion, p. 5a.) Specifically, the Court concluded that "a statute [Civ. Code § 47(2)] cannot immunize from liability conduct made actionable by the California Constitution." (Appendix - California Court of Appeals Fifth District Opinion, p. 60a.) In its opinion, the court drew attention to the "federal constitutional right of privacy":

> In discussing the relationship between the federal constitutional right of privacy and another portion of the section 47 privilege, Rancho La Costa, Inc. v. Superior Court (1980) 106 Cal.App.3d 646 [165 Cal.Rptr. 347] held: "Plaintiffs as private individuals are entitled to the protection of their right of privacy. That right is entitled to redress when violated. Under the mandate of the recent

> Federal Supreme Court rulings, the right of privacy is paramount to the right of free speech when in the exercise of free speech a defendant violates another's privacy by uttering a defamatory lie about him. The right of free speech guaranteed by the state and federal Constitutions does not permit violation of the right of privacy. It most surely follows that the privilege created by Civil Code section 47(3), a statute, and thus a law of lesser organic force, cannot be expanded to permit violation of that same right of privacy. Whatever privilege is accorded defendants under Civil Code section 47(3), it must yield to the plaintiffs' constitutional rights of privacy.

(Appendix - California Court of Appeals Fifth District Opinion, pp. 61a-62a.) The Fifth Appellate District also rejected Respondents' claims that Civil Code section 56.10(c)(4) rendered inapplicable the prohibition against disclosure set forth in Section 56.10 et seq. (Appendix - California Supreme Court Opinion, p. 6a.)

Respondents sought review by the California Supreme Court, which granted review without specifying any limitations by order dated October 21, 1993. In her Answer Brief on the Merits, Petitioner references her "constitutional right to privacy" under both the California and United States Constitutions. (Appendix - Appellant's Answer Brief on the Merits, pp. 90a, 91a, 93a, 94a, 96a, 97a, and 99a.) The California Supreme Court filed its Opinion on July 25, 1994. There, the court applied its recent decision in *Hills v. NCAA, suprs,* 7 Cal.4th 1 (1994) to the Petitioner's case. That application followed the path of the Federal Constitutional right through such United States Supreme Court cases as *Griswold v. Connecticut* 381 U.S. 479 (1965) and *Roe v. Wade* 410 U.S. 113 (1973). The *Hill* opinion also makes explicit reference to the constitutional right to privacy as developed by these cases. (Appendix - California Supreme Court Opinion, pp. 12a-15a.)

The California Supreme Court concluded that Petitioner had failed to state a cause of action under Civil Code section 56.10 because Respondents are exempted under section 56.10(c)(4). Additionally, the court concluded that Petitioner also failed to satisfy the three-

prong test in *Hill v. NCAA*, *supra*, in that "she does not plead that she has either a legally protected privacy interest, or a reasonable expectation of privacy, in information that would eventually have been discovered in litigation." Moreover, the court held that Petitioner did not allege a "sufficiently serious invasion of her privacy interest to warrant actionable relief under the privacy clause of our state Constitution." (Appendix - California Supreme Court Opinion, p. 16a.)

The majority opinion was written by Chief Justice Lucas. Justices Mosk and Kennard dissented.

REASONS FOR GRANTING WRIT

I.

PETITIONER'S FEDERAL RIGHT TO PRIVACY, WHICH WAS ADEQUATELY RAISED IN BOTH THE PETITIONER'S ANSWER BRIEF AND IN THE CALIFORNIA SUPREME COURT'S OPINION, WAS VIOLATED BY RESPONDENTS.

A. PETITIONER'S RIGHT TO PRIVACY AFFORDED TO HER BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS INFRINGED UPON BY RESPONDENTS' DISCLOSURE OF PERSONAL INFORMATION IN VIOLATION OF THE PHYSICIAN-PATIENT PRIVILEGE.

Petitioner requests review of the California Supreme Court's holding which deprived her of her fundamental right to privacy afforded to her by the Fourteenth Amendment to the United States Constitution. Historically, the United States Supreme Court has interpreted the Fourteenth Amendment to encompass rights within the area of personal autonomy - intimate relationships and decisions have been protected from state intrusion and are held to be implicit in the concept of ordered liberty. In *Griswold v. Connecticut* 381 U.S. 479 (1965), Justice Douglas noted that the Connecticut law at issue ". . . operates directly

on an intimate relationship of husband and wife and their physician's role is one aspect of that relation."

Justice Douglas, in his concurring opinion in *Doe v. Bolton* 410 U.S. 179, 208 (1973), noted that "[t]he right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to the Fourteenth Amendment values." (Emphasis added.) Lower courts subsequently adopted Justice Douglas' view of patient's rights as one of the penumbral privacy interests. In *Whalen v. Roe* 423 U.S. 49 (1975), the District Court below stated that "the intimate nature of a patient's concern about his bodily ills and the medication he takes are protected by the constitutional right to privacy." On subsequent review [*Whalen v. Roe* 429 U.S. 589 (1977)] this Court stated that a duty exists to avoid unnecessary disclosure of medical information, which was defined as dissemination by public health officials to a party who have no legitimate interest in the information. Justice Douglas recognized that the right to privacy protected by the Fourteenth Amendment encompasses the right to care for one's health and person and to seek out a physician of one's choice. (*Griswold v. Connecticut*, *supra*, at p. 219.)

When Respondent Dr. Yamaguchi clandestinely became an expert witness to testify against his own patient, Petitioner Doris Heller, and collected and disseminated confidential information for Respondent Norcal's financial benefit, he violated her Fourteenth Amendment right to privacy. Using Petitioner's lawsuit against Dr. Geis as a cover for his constitutionally violative acts, Dr. Yamaguchi misused Mrs. Heller's openness and trust in the physician-patient relationship to extract personal information unrelated to his prospective defense, to improperly modify her treatment plan, and to encourage early settlement of the Geis litigation. Such conduct represents a deprivation of a patient's fundamental right to choose her own physician and rely upon his advice.

In *Mills v. Rogers* 457 U.S. 291 (1982), this Court granted certiorari to determine whether an involuntarily-committed mental patient has a constitutional right to refuse treatment with antipsychotic drugs. The court declined to identify and rule on the specific liberty interests under the doctrine of abstention, but concluded that a mental

patient's right to refuse treatment with a certain drug gives rise to a liberty interest traditionally protected by the Fourteenth Amendment. Justice Douglas' opinion in *Griswold v. Connecticut* supports Petitioner's allegation that there exists a fundamental right to privacy in communications made during the course of the physician-patient relationship and that Respondents violated this right by their actions. Petitioner further asserts that the strongest protection available should be afforded when non-medical information (such as emotional and financial matters) is unnecessarily disclosed within this privileged relationship. Petitioner's relationship with Dr. Yamaguchi as her treating physician is an intimate relationship such as the one between the husband, wife and her physician in *Griswold* and should be similarly protected by the Fourteenth Amendment.

Respondent Dr. Yamaguchi's disclosure of information obtained during the course of confidential conversations protected by the physician-patient privilege violated Petitioner's Fourteenth Amendment right to privacy. The information Dr. Yamaguchi disclosed was not only irrevelant to Petitioner's malpractice action, but also to Dr. Yamaguchi's treatment of Petitioner's medical condition. Dissemination of this information does not fall within the statutory exception of the physician-patient privilege.[1] Norcal subsequently used this information to obtain a more favorable settlement in a malpractice action brought by the Petitioner against Norcal's insured, Dr. Geis.

As a direct parallel to Justice Douglas' concerns in *Doe v. Bolton*, Petitioner faced a crisis in her health care - the malpractice of her treating physician Dr. Geis - which necessitated she be able to seek out and rely on the physician of her choice. Through her new treating physician, Respondent Yamaguchi, Mrs. Heller could receive medical treatment and advice to ameliorate the debilitating physical and psychological effects of the reflex dystrophy caused by Dr. Geis' negligence. Like the family who faces the abortion decision unaided

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1 The waiver of the physician-patient privilege is contained in California Evidence Code section 996(a).

by the physician of their choosing, Petitioner was cared for by a spy for her legal opponent, the insurance carrier whose only goal was to limit the malpractice award.

The right to have non-medical information kept in confidence and protected from disclosure to non-interested parties is closely related to the right to choose one's physician without interference. State action in contravention of these rights not only invades constitutionally protected rights, but also hampers the free flow of information essential to adequate diagnosis and medical treatment. Respondents' actions in obtaining confidential information and placing it in the hands of parties possessing no legitimate interest in it resulted in the complete destruction of the confidence Petitioner placed in her physician. These actions constitute violation of privacy rights implicit in the concept of ordered liberty that are traditionally protected by the Constitution.

B. CALIFORNIA CIVIL CODE SECTION 56.10 ET SEQ. IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED BECAUSE IT VIOLATES PETITIONER'S RIGHT TO PRIVACY BY ALLOWING A TREATING PHYSICIAN TO DISCLOSE CONFIDENTIAL, NON-MEDICAL INFORMATION TO HIS MALPRACTICE INSURANCE CARRIER WHEN HE WAS NEVER THE TARGET OF ANY LAWSUIT INVOLVING HIS TREATMENT OF THE PETITIONER PRIOR TO THOSE DISCLOSURES.

The California Supreme Court has declared that California Civil Code section 56.10(c)(4) (hereinafter Section 56.10(c)(4)) provides a "permissive exception" to the Confidentiality in Medical Information Act (Civ. Code §§ 56.10 et seq.). As the court states, "as an associate of [Dr.] Geis, and plaintiff's treating physician, Yamaguchi was certainly at risk of medical malpractice exposure. Indeed, that risk became a reality when plaintiff filed the present action against Yamaguchi and included a cause of action for professional negligence, which is still viable and not at issue in this appeal. Accordingly, as a potential litigant in a malpractice action *and* a provider who "may

incur" malpractice liability, Yamaguchi was permitted to discuss with Norcal plaintiff's medical condition under section 56.10(c)(4)."[2]

Accordingly, the court has interpreted Section 56.10(c)(4) such that any of Petitioner's treating physicians who possess confidential medical or non-medical information may communicate that information to any organization "responsible for defending professional liability" - so long as they "may incur" liability for their actions.[3] Since any physician "may incur" liability during the course of treating his or her patients, the California Supreme Court has rendered the exception contained in Section 56.10(c)(4) an unconstitutional infringement into the physician-patient relationship. Based on the state court's interpretation, litigants like Norcal may now approach treating physicians and gather non-medical information whose only pertinence is in limiting (or defeating) medical malpractice awards.

Such an interpretation offends the Petitioner's right to choose and rely upon the physician of her choice, which this Court has recognized as a fundamental right under the Fourteenth Amendment of the Constitution.

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2 What has escaped the court's attention is that Dr. Yamaguchi was never a target of the malpractice action against Dr. Geis, since the surgery which they both performed occured after the latter's malpractice. The court's attempt to bolster its interpretation of Civil Code section 56.10(c)(4) by pointing to the fact that Dr. Yamaguchi was ultimately sued for medical malpractice ignores - at the successful urging of Respondents - that Petitioner's medical malpractice cause of action against Dr. Yamaguchi expressly excludes his pre-disclosure care and treatment, i.e., during the pendency of Dr. Geis' care. (See Appendix - Petitioner's Answer Brief on the Merits, p. 75a.)

3 In his dissent, California Supreme Court Justice Mosk accurately stated that, notwithstanding the ungrammatical interpretation used by the majority of the court, "there is certainly no evidence that Dr. Yamaguchi was defending *his* professional liability when he made the disclosures--nor am I aware of any evidence in the record before us establishing that Dr. Yamaguchi actually 'might incur' malpractice liability at the time he made the disclosure." (Appendix - California Supreme Court Opinion, p. 21a.)

C. THE ACTIONS OF RESPONDENTS COUPLED WITH THE DECISION OF THE STATE SUPREME COURT PROVIDE THIS COURT WITH STATE ACTION SUFFICIENT TO RULE ON THE CONSTITUTIONAL VIOLATION.

Respondent Norcal, through its actions as a state regulated carrier of medical malpractice insurance, violated Petitioner's Constitutional right to privacy. As a licensed provider in the State of California, Respondent's actions constitute state action. Due to the rapidly expanding concepts of tort liability in the State of California, the California legislature has enacted specific and comprehensive regulatory schemes with which all malpractice insurance carriers must comply in order to engage in the underwriting of malpractice insurance in California. These regulatory schemes include, but are not limited to, elaborate rules surrounding creation of a membership association, known as the Joint Underwriting Association, which is the exclusive agency through which medical malpractice may be written; the purpose of such association; rates which may be charged; and size and term of the board of directors of the association. The California Insurance Commissioner also regulates the association's plan of operation which must be approved by the Commissioner before the provider can operate in the State of California. (California Insurance Code Sections 11890 et seq.)

The California legislature enacted these regulations to enable malpractice carriers to enter the California market. The legislature recognized that without the State's intervention and control of insurance carriers, the voluntary market for medical malpractice insurance would be seriously affected. (See California Stats 1975 ch 93, effective May 23, 1975.) Without the availability of malpractice insurance, adequate medical care in California would be seriously affected.

Respondent Norcal, as a member of this association, falls within the State's highly statutory scheme. Respondent is one of few medical malpractice insurance carriers in the State of California who have been authorized to underwrite insurance. Although the Court has been reluctant to find state action based solely upon the State's conferral

of a monopoly, it has been suggested that the monopoly factor weighs heavily in determining whether constitutional obligations can be imposed on formally private entities. (*Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944).) Further, the State's statutory pattern makes it amply clear that it expects malpractice insurance carriers to behave more like governmental entitles than private corporations. As such, the actions of Norcal are so entwined with the State's actions of regulation and supervision of these parties as to be imputed as state action.

Through judicial interpretation and enforcement of California's State Constitution in violation of the Federal Constitutional right to privacy, the state court's actions constitute state action. It has been consistently held by this Court that judicial enforcement of substantive common-law rules formulated by those courts that violate rights guaranteed by the Fourteenth Amendment constitute state action. (*Federation of Labor v. Swing*, 312 U.S. 321 (1941).) In the case at bar, the California Supreme Court was called upon to interpret the California Constitution, Article I, Section 1 as developed by the California legislature. This Section was formulated and designed within the scope of the Fourteenth Amendment right to privacy. As an addition to a state constitution, these rights must be equal to or more expansive than those found in the Federal Constitution. As interpreted by the California Supreme Court, however, these rights are less protective of one's privacy rights than is the Federal Constitution. The state court formulated a three-prong test which parties must meet in order to plead a violation of one's right to privacy. The California Supreme Court stated that "a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish" each of the three prongs. A Defendant, on the other hand, may prevail "by negating any of the three elements. . . or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." (*Heller v. Norcal* (1994); Appendix, p. 1a) Petitioner's privacy interests in communications with her treating physician which are irrelevant to any proceedings should at the very least require a showing which meets the "compelling state interest" test before they may be violated.

It has also been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of State Courts. (*Shelly v. Kramer*, 334 U.S. 1 (1948). The state court has violated Petitioner's rights as guaranteed by the Fourteenth Amendment by sustaining a demurrer. The court, in its holding, stated that Petitioner was not going to be given the opportunity to replead her case as she had failed to state an unreasonable expectation of privacy, which is prong two of the three prong test.[4] The court, in its formulation of this test, stated that "whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact." (*Hill v. NCAA* 7 Cal.4th 1, 40 (2994), emphasis added.) However, contrary to the test, the court in this case sustained the demurrer, stating as a matter of law that Petitioner failed to state a cause of action. The difference between the rule as stated and the rule as applied denies the Petitioner the right to present the issue to a fact-finder. The state has therefore affirmatively acted to deny Petitioner her rights as guaranteed by the Fourteenth Amendment.

D. THE STATE COURT'S DECISION ADEQUATELY AND APPROPRIATELY RAISES AND RULES ON THE CONSTITUTIONALITY OF CALIFORNIA'S RIGHT TO PRIVACY IN THIS CASE THROUGH ITS APPLICATION OF THE *HILL* TEST AND THE RECORD SUPPLIED THEREIN.

Petitioner requests review of the lower court's holding based

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4 Another defect of the majority opinion was remarked upon by Justice Kennard when she said , "[t]o conclude, as the majority and Justice Mosk do, that all of the confidential material Yamaguchi disclosed to Norcal was directly relevant to plaintiff's malpractice claim against Dr. Geis and essential to that claim's fair resolution is sheer speculation, and improbable speculation at that. In particular, it is difficult to conceive how financial information, disclosed in confidence in the course of the doctor-patient relationship, could have any direct relevance to plaintiff's malpractice claim against Dr. Geis." (See Appendix - California Supreme Court Opinion p. 36a)

upon a violation of the United States Constitutional right to privacy. The phrase "constitutional right to privacy" as set forth in Petitioner's Brief on the Merits to the California Supreme Court is used in reference with the United States Constitution as well as the California Constitution. (Appendix - Appellant's Answer Brief on the Merits, pp. 90a, 91a, 93a, 94a, 96a, 97a and 99a). Further, the California Supreme Court's holding purports to construe the Federal Constitutional right to privacy based upon the California Constitution, Article I, Section 1.

As discussed in the California Supreme Court's decision in *Hill v. NCAA* 7 Cal.4th 1 (1994) (hereinafter referred to as *Hill*), although the California Constitution contains its own privacy protections, those provisions are designed to provide privacy protections that are equal to those found in the United States Constitution (*Hill, supra*, at pp. 29 and 30.) Further, the *Hill* court extensively explained that the privacy protections found in the California Constitution were based on the Federal Constitutional right to privacy (p. 23). The *Hill* court followed the path of the Federal Constitutional right through cases such as *Griswold v. Connecticut* 381 U.S. 479 (1965) and *Roe v. Wade* 410 U.S. 113 (1973). The *Hill* court stated that the California Constitution, Article I, Section 1 was prepared from and makes explicit reference to the Federal Constitutional right to privacy as developed by these cases (*Hill, supra*, at p. 28).

In *Dewey v. Des Moines* 173 U.S. 193, 197 (1899), the court held that under the enlargement doctrine, "parties are not confined to the same arguments which were advanced in the courts below upon a Federal question there discussed." (*Dewey v. Des Moines, supra*, at p. 198.) If a federal question presented to the Supreme Court is one that only requires "enlargement of one mentioned in the State Court, or if it were so connected with it in substance as to form . . . we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued." (*Ibid.*; emphasis added). The Federal question must only be brought to the attention of the court below in some manner. (*Ibid.*; emphasis added.)

The *Hill* test was explicitly created through the enlargement of the federal right to privacy. Further, as stated by the court, the California Constitution, Article I, Section 1, is directly connected to the Federal Constitutional right to privacy. The California Supreme Court has thoroughly discussed the Federal Constitutional connection to this Initiative in *Hill*.

More recently, it has been held that the rule, now entitled "not pressed or passed upon below", is merely a prudential restriction and does not pose a bar to appellate review. (*Illinois v. Gates* 462 U.S. 213 (1983).) This Court looks to the record established in the lower courts as well as comity to the states to determine the prudence of its jurisdiction to review a constitutional issue. Petitioner contends that a well-developed record exists through the California Supreme Court's application of the three prong test established in *Hill*. Since this test was created through analysis of the federal case law surrounding the right to privacy, this Court need look only to *Hill* as applied to the case at bar on the issue of violation of Federal Constitutional privacy rights.

Finally, in *Cardinale v. Louisiana* 394 U.S. 437, 438-439 (1969), it was held that "no particular form or words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time." The instant case is in line with that statement in that the state court, by application of the *Hill* test, had an opportunity to rule the issue of whether the California Constitution, Article I, Section 1 was violative of the Federal Constitutional right to privacy. Therefore, the Federal Constitutional right to privacy, as applied in the case at bar, was adequately raised in the state court to justify review by this Court.

II.

WHERE AN INTERNATIONAL TREATY GUARANTEES THE RIGHT TO PRIVACY TO INDIVIDUALS, CAN A STATE STATUTE OR STATE CONSTITUTIONAL PROVISION PERMIT AN INSURER AND A PATIENT'S TREATING PHYSICIAN TO OBTAIN AND DIVULGE NON-RELEVANT, CONFIDENTIAL INFORMATION ABOUT THAT PATIENT?

A. A TREATY, RATIFIED AND EFFECTIVE AS OF SEPTEMBER 1992, PROVIDES AN INDEPENDENT BASIS FOR A GUARANTEE OF DOMESTIC PRIVACY, AND IS THE SUPREME LAW OF THE LAND UNDER ARTICLE VI OF THE UNITED STATES CONSTITUTION.

The International Covenant on Civil and Political Rights [opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992)] (hereinafter ICCPR), is a treaty agreed to by over 117 nations. The full United States Senate, without objection, gave its consent to ratification on April 2, 1992. The treaty became law as ratified on September 8, 1992. Article VI, sec. 2 of the United States Constitution gives the treaty the weight of "supreme Law of the Land." The State Department published notice of the treaty ratification in the Federal Register August 31, 1993. (58 Fed.Reg. 45934.)

Petitioner's case did not survive the pleading stage. On November 20, 1990, petitioner filed her Fourth Amended Complaint For Damages alleging, *inter alia*, various invasions of privacy founded on state disclosure statutes and on state and federal Constitutional rights to privacy. In her answer brief filed with the California Supreme Court, Petitioner cited applicable federal Constitutional privacy cases as well as cases citing the California Constitutional right to privacy. The California Constitutional right to privacy states that, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, and acquiring, possessing, and protecting property, and pursuing and obtaining safety,

happiness, and privacy." and that state right has been held by California courts to encompass and include the outer perimeter of the federal Constitutional right to privacy as it existed prior to the treaty.

The chronology of this litigation is needed to show at what point during the appeal process the ICCPR treaty became effective. Petitioner filed her Fourth Amended Complaint on November 20, 1990. On January 31, 1991, the trial court sustained, *inter alia*, Respondents' demurrer as to the 7th, 8th and 12th causes of action without leave to amend. On December 2, 1991, Petitioner filed Appellant's Opening Brief with the California Court of Appeal, Fifth District, attempting by writ and appeal to reverse the trial court's sustaining of the demurrers. At the time Petitioner had filed its opening brief on December 2, 1991 with the Fifth Appellate District, the ICCPR had not yet been ratified or deposited. On July 13, 1993, the Appelate Court issued its opinion, reversing the trial court's ruling which had sustained the demurrers as to the 7th, 8th and 12th causes of action and granting leave to amend. By the time the Court of Appeal had reversed, the ICCPR had become the supreme law of the land (treaty effective September 8, 1992), though the Court of Appeal did not mention the ICCPR in its ruling on its own judicial notice and the U.S. State Department had not issued its notice in the Federal Register, which it subsequently did on August 31, 1993.

Respondents then sought reversal of the appellate court in the California Supreme Court. On September 13, 1993 Petitioner answered Respondent's petition for review in the California Supreme Court (Appendix - Petitioner's Answer Brief on the Merits, pp. 66a), and made its first argument to the California Supreme Court that Respondents had violated Petitioner's Constitutional right to privacy, both under the State and Federal Constitutions. Petitioner's privacy arguments corresponded with the allegations in Petitioner's Fourth Amended Complaint in causes of action 7, 8 and 12. By that time, the ICCPR's privacy provision was in effect and was controlling over any conflicting prior state statutes or state constitutional privacy provisions, but had only been published and made officially known two weeks earlier in the Federal Register.

Though not expressly mentioned in the briefing before the California Supreme Court, Petitioner advances that this Court has jurisdiction to interpret the right of privacy under Article 17 of the ICCPR as an enlargement of the privacy argument contained in Petitioner's briefs before the California Supreme Court. The ICCPR derives its domestic applicability through the supremacy clause of the Constitution and, as such, is included within the traditional penumbral rights of privacy that existed at the time of the California Supreme Court briefing and prior to the decision of the California Supreme Court on July 25, 1994, which reversed the Court of Appeal and sustaining Respondents' demurrers without leave to amend. The ICCPR right of privacy, though given its force and effect through the supremacy clause of the Constitution is a separate federal right of privacy which petitioner respectfully requests this court now interpret in light of narrower and restrictive California state statutes on privacy disclosure and the California Constitutional Article I, sec. 1 right of privacy .

In California, pursuant to California Evidence Code sec. 452, the Supreme Court had the discretion to take judicial notice, *sua sponte*, of the ICCPR but did not mention it in its decision. The California Supreme Court was aware of the ICCPR, prior to ratification, and had cited the ICCPR in two decisions concerning the criminal justice provisions in the ICCPR (*People v. Ghent* 43 Ca.3d 739, 781, 739 (1987); *People v. Levins* 22 Cal.3d 620, 625, 586 (1978)).[5]

The treaty provides to all citizens of the signatory nations the rights set forth in the Bill of Rights, and additionally, in Article 17, guarantees to all individuals an express right to privacy. Under Article 17, sec. 1 of ICCPR, every United States citizen is guaranteed freedom

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5 Examination of the ICCPR's history illustrates at least some of the difficulty Petitioner faced in determining and locating the law applicable to her action. In the case of a little- publicized international treaty these difficulties are magnified. The text of an international treaty is not published in the United States Codes or the Statutes at Large. Other than notice in the Federal Register, there is no other widely-circulated domestic source available by which to ascertain such a treaty or its official language.

from ". . .arbitrary or unlawful interference with his privacy, family, home or correspondence. . .." Article 17 sec. 2 provides to every citizen ". . .the right to the protection of the law against such interference or attacks." The scope of the Article 17 privacy provision has yet to be interpreted by this court and thus this case is one of first impression. Petitioner respectfully requests that this court find that like the Thirteenth Amendment prohibiting slavery, this newly-created federal privacy interest applies to both state and private action and therefore individuals may invoke the treaty to protect their civil interests. This privacy right is not found in any federal statute. Article 5 of the ICCPR further provides:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right toengage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

When the ICCPR's Article 5 application to individuals is read together with the specific right of privacy guaranteed to all citizens under Article 17, an express federal right of privacy to each citizen is granted. This grant is protected against interference by individuals, groups and the State.

Respondents interfered with Petitioner's right to privacy by disclosing information pertaining to Petitioner's emotional and economic status in order to compel Petitioner to accept an early and less costly settlement in her underlying malpractice suit against Respondent Dr. Yamaguchi's associate, Dr. Geis. Petitioner further alleges that the interference with her privacy occurred after Respondent Dr. Yamaguchi agreed, without Petitioner's knowledge or consent, to act as Norcal's expert witness in the malpractice action settlement. At the time these disclosures were made by Respondent, Petitioner had not pursued any legal action against Dr. Yamaguchi.[6]

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6 See Section I(B), fn. 2, *supra*.

In the state courts, Mrs. Heller presented arguments based on relevant cases interpreting both the Federal and California constitutional rights of privacy. The scope of this privacy right is further broadened by application of Article 17 of the ICCPR. Petitioner's allegations of violation of her privacy right allows her to rely on the ICCPR as an enlargement of this right to be argued before this Court. (*Dewey v. Des Moines, supra,* 173 U.S. 193 (1899).) The ICCPR right of privacy, though given its force and effect through the Supremacy Clause of the Constitution, is a separate federal right which Petitioner respectfully requests this Court to interpret.

B. THE COURT SHOULD FIND THAT THE COVENANT IS SELF-EXECUTING DUE TO THE SENATE'S CHARACTERIZATION OF THE NON-SELF-EXECUTING CLAUSE AS AN UNDERSTANDING RATHER THAN A RESERVATION.

The Restatement (Second) of Foreign Relations Law of the United States (1965) (hereafter the Restatement) Section 154(1) states that the courts shall determine the self-execution status of an international treaty. This follows the U.S. Constitution judicial review doctrine first set forward in *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803). The Court has found covenants to be self-executing in the past in *U.S. v. Percheman* 32 U.S. (7 Pet.) 51, 82 (1833) and *Burgess v. Gray* 57 U.S. (16 How.) 48, 50 (1856). Although they contained words to the effect ". . . shall be ratified and confirmed . . ." which would presage a future legislative act, the parties involved could actually intend that they ratified and confirmed by ". . . force of the instrument itself." In the present case the Covenant on Civil and Political Rights in its Preamble and in Article 2, specifically set forth the intention of the Covenant to grant individuals a remedy for State interference with any of the enumerated rights, and shows the intent of the drafters to make the treaty self-executing with respect to an individual's right to seek a judicial remedy.

In a case out of the Ninth Circuit, *Saipan v. United StatesDepartment of the Interior* 502 F.2d 90, 97 (1974) the court held that:

> The extent to which an international agreement establishes affirmative and judicially enforceable obligations without enabling legislation must be determined in each case by reference to many contextual factors: the purpose of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.

In that case the court heard an appeal by the citizens of Saipan to enjoin the construction of a hotel which would destroy the environment of a large area of the island. In the present case the right to privacy of not only the petitioner but of every other medical patient in California is at issue. For this reason the Court should exercise its power under Article III and Article VI, clause 2 of the United States Constitution and declare that the ICCPR is a self-executing treaty under the intent of Article 2 and Article 5, clause 2 of the said treaty. "Whether an international agreement of the United States is or is not self-executing is finally determined by courts in the United States if the issue arises in litigation." (Restatement Section 154(1).)

C. THE SENATE DECLARATION OF NON-SELF-EXECUTION IS VOID PURSUANT TO INTERNATIONAL LAW AND PAST DECISIONS OF THIS COURT.

Restatement Section 303 comment (d) declares that any Senate addition other than a Reservation would not become "the Law of the Land," i.e., a non-self-executing treaty. Here, the non-self-execution declaration would immediately place the United States in violation of

the ICCPR. Former President Bush's intent in including the declaration was to remove an individual's right to access to the courts afforded by the treaty. His action was in direct contravention of Article 5, section 2 of the ICCPR. This action also negates the obligation of a signatory to adhere in good faith to its treaty obligations.

Federal courts have decided one case on the issue of the validity and effect of a Senate declaration on an international treaty. The Court of Appeals for the District of Columbia Circuit in *Power Authority v. Federal Power Commission* 247 F.2d 538 (D.C. Cir. 1957) held that a qualification statement, other than a reservation, made by the Senate in a resolution of consent had no force as domestic law. The court also held that a reservation consented to by the Senate and ratified would become part of the treaty and therefore "Law of the Land" under Article VI, clause 2. The Supreme Court has found that Congress can make domestic law which would amend the treaty as applied domestically, but to do so they would have to follow the legislative procedures set out in Article I, section 7, clause 2. The requirement for bicameralism in the adoption of legislation has been well established in *Immigration and Naturalization Service v. Chadha* 462 U.S. 919 (1983). Therefore, the declaration cannot even be considered as valid domestic law without the concurrence of the House of Representatives and the signature of the President (U.S. Const. Art. I, sec. 7, cl. 2, *Morrison v. Olson* 487 U.S. 654 (1988)).

D. AS THE COVENANT ON CIVIL AND POLITICAL RIGHTS HAS BEEN RATIFIED BY THE UNITED STATES, THE PRIVACY RIGHTS OF PETITIONER AND OTHER MEDICAL PATIENTS ARE THE SUPREME LAW OF THE LAND, AND ANY STATE ACTION WHICH TENDS TO BURDEN THESE RIGHTS SHOULD BE EXAMINED WITH THE HIGHEST SCRUTINY.

The actions of the courts of California in granting the Respondents' demurrer and dismissing Petitioner's privacy causes of action without leave to amend deprived the petitioner of her right to privacy without substantive or procedural due process. Petitioner should be protected against such action under the XIV amendment of the United States Constitution just as her rights would be protected under the Bill of Rights in the Federal system. (*Malloy v. Hogan* 378 U.S. 1 (1964).) The Court has always considered that fundamental rights and certain protected liberty interests are due the highest protection from state burden by either legislation or court action. The Court has followed this tradition whether the protected interest was a property right (i.e., *Nollan v. California Coastal Zone Commission* 483 U.S. 825 (1987) and *Dolan v. City of Tigard* ___ U.S. ___, 129 L.Ed.2d 304, 114 S.Ct. 2309, 62 U.S.L.W. 4596(1994)), or the right of a couple to use contraceptives, i.e. , *Griswold v. Connecticut*, *supra*, and *Eisenstadt v. Baird* 405 U.S. 438 (1972). In this case the right of Petitioner to expect a right of privacy concerning her conversations with her physician, even while in the midst of a malpractice suit against another doctor, must be given the same protections afforded other constitutional or statutory rights.

III.

CONCLUSION

This total destruction of the confidence placed in one's physician violates the basic values implicit in the concept of ordered liberty. The right to choose one's physician without interference is directly related to the right to keep in confidence irrelevant, non-medical information from non-medical parties who have no legitimate interest in such information. A rule stating otherwise not only violates one's right to privacy, but hampers the free flow of information which is essential to adequate medical treatment and diagnosis.

Additionally, the foregoing arguments show that the Court should declare the Covenant on Civil and Political Rights a self-executing instrument and that under Articles 2, 5(3)(b), and 17, Mrs. Heller's right to privacy was abrogated by the courts of California when they refused to allow her to amend her complaint.

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